

Matter of Markwick v NYS DOCCS
2020 NY Slip Op 33758(U)
October 21, 2020
Supreme Court, Clinton County
Docket Number: 2020-256
Judge: Michael R. Cuevas
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

In the Matter of the Application of

JEREMIAH MARKWICK, #18-B-1605,

Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

ORDER AND JUDGMENT

RJI #09-1-2020-0145

INDEX #2020-256

-against-

NYS DOCCS,

Respondent.

This proceeding was originated by the Petition for a judgment pursuant to CPLR Article 78 of Jeremiah Markwick (hereinafter referred to as “Petitioner”), sworn to April 16, 2020, which was filed in the office of the Clinton County Clerk on May 6, 2020, together with an Affidavit in Support of an Order to Show Cause and several exhibits. Additionally, Petitioner filed an Affidavit in Support of an Application for Fee Reduction and/or Waiver Pursuant to CPLR §1101(f). On May 8, 2020, Acting Supreme Court Justice Timothy J. Lawliss issued an Order to Show Cause directing the manner of service. On May 28, 2020, Respondent, New York State Department of Corrections and Community Supervision (hereinafter referred to as “Respondent” or “DOCCS”), through its attorney, Letitia James, Attorney General, (Christopher J. Fleury, Esq., AAG, Of Counsel) filed its Answer and Return. On or about June 4, 2020, Petitioner filed a Reply Affidavit.

Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging what he terms his “illegal detention” beyond his Parole Merit Eligibility Date and the illegal amplification of his sentence by the New York State Department of Corrections and Community Supervision contrary to law. Specifically, Petitioner claims his Parole Merit Eligibility Date was changed from April 9, 2020, and his Maximum Expiration date was changed from approximately June 6, 2021 to April 4, 2022.

Respondent argues that Petitioner's time calculations had been mis-calculated and that it is obliged by law to correct any errors so as to properly apply the law to sentences issued by the Courts and the effects of time of Petitioner's releases to parole supervision.

On June 12, 2015, Petitioner was sentenced by the Lewis County Court to an indeterminate term of two (2) years to six (6) years upon a conviction of Grand Larceny in the Second Degree (Case No. 2013-038), an indeterminate term of one and one-third (1 1/3) years to four (4) years upon a conviction of Burglary in the Third Degree and a one (1) year determinate term upon a conviction of Criminal Possession of Stolen Property in the Fifth Degree (Case No. 2014-003). All three sentences were ordered to run concurrently.

On June 18, 2015, Petitioner was received into DOCCS's custody and was credited with four hundred eleven (411) days local jail time.

One November 14, 2015, Petitioner was sentenced in the Jefferson County Court to a two (2) year determinate term with two (2) years post-release supervision upon his conviction of Criminal Sale of a Controlled Substance in the Third Degree (Case No. 15-205-15). In accord with Penal Law §70.25(1)(a), in effect at that time, the Jefferson County sentence ran concurrently with the prior Lewis County sentences.

Based upon, the longest sentence (the Lewis County sentence of two to six (2 – 6) years), DOCCS originally calculated Petitioner's initial Parole Eligibility Date as May 1, 2016. Consequently, he was released to post-release supervision on May 2, 2016. Thereafter, Petitioner was declared delinquent on 5/23/16, restored to post-release supervision on 6/30/16 and directed to the Drug Treatment Campus, restored to post-release supervision on 7/11/16 and returned to DOCCS with forty-six (46) days parole jail time credit, released again to post-release supervision from DOCCS on 10/25/16, declared delinquent on 11/17/16 and restored to post-release supervision with forty-three (43) days parole jail time credit on 12/29/16. Petitioner was once more released from DOCCS to post-release supervision on 4/18/17, was declared delinquent on 6/6/17, was sentenced in Jefferson County Court to a four (4) year determinate term and three (3) years' post-release supervision on a conviction of Criminal Possession of a Controlled Substance in the Third Degree on 6/8/18. Petitioner was then received into DOCCS custody on 6/14/18 and credit with three hundred seventy-three (373) days local jail time on this sentence. In accord with Penal Law §70.25(1)(a), as effective at that time, the 2018 Jefferson County sentence ran concurrently with the prior 2015 Jefferson County and Lewis County sentences. DOCCS then calculated Petitioner's initial Maximum Expiration Date as May 1, 2020, and his Earliest Conditional Release Date as May 1, 2018. Respondent now claims its calculations were in

error.

Respondent now correctly states that upon Petitioner's initial release from DOCCS to post release supervision on May 2, 2016, the running of his terms of imprisonment were held in abeyance and the commencement of his post-release supervision period commenced. The result being that Petitioner then had three (3) years, eleven (11) months and twenty-nine (29) days of his maximum, six (6) year term held in abeyance at that time. That time held in abeyance would then be reduced by the periods of parole jail time of forty-six (46) and forty-two (42) days referred to above to produce a net time held in abeyance of three (3) years, nine (9) months and one (1) day on his maximum term prior to his 2018 sentence. His PRS Maximum expiration of two (2) years would be reduced by his time on post-release supervision to one (1) year, seven (7) months, and three (3) days.

Petitioner's 2018 sentence affected his parole eligibility date by 6/7th of his four (4) year determinate term or three (3) years, five (5) months and two (2) days from when he was received back into DOCCS custody on June 14, 2018, resulting in a new eligibility date of November 11, 2021. Once Petitioner is credited with three hundred seventy-three (373) days of jail time and six (6) months and twenty-eight (28) days possible merit time, his initial Merit Eligibility Date becomes April 9, 2020.

When the time held in abeyance (three (3) years, nine (9) months, one (1) day) on Petitioner's maximum term of the 2015 sentence is added to the date he was returned to DOCCS (June 14, 2018), his Maximum Expiration Date becomes March 15, 2022, which reduced by possible good time (one (1) year, four (4) months and eight (8) days), results in Petitioner's Earliest Conditional Release Date of November 7, 2020.

However, DOCCS now asserts that it determined earlier this year that it had miscalculated the November 2015 sentence because the previous calculation credited the November sentence with local jail time as if it had run concurrently with the June 2015 sentence which commenced June 18, 2015. Since Petitioner was not even indicted on the November 2015 case until October 23, 2015, he could not have served that local time concurrently. Recalculating the November 2015 sentence without the benefit of the local jail time, results in a Parole Eligibility Date of March 3, 2017 and a Maximum Expiration Date of June 17, 2017.

DOCCS was then required to reflect the time-owed on the November 2015 sentence in all of the Petitioner's subsequent release date calculations. Starting with Petitioner's Parole Eligibility date for the November 2015 sentence of March 3, 2017, as of his release date of May 2, 2016, 10 months and one

day of the November 2015 was held in abeyance which in turn is reduced by the two (2) periods of parole jail time of forty-six (46) and forty-two (42) days to yield a net time held in abeyance on the November 2015 sentence of seven (7) months and three (3) days. Pursuant to *Penal Law §70.40(1)(a)(iv)*, the petitioner would then be required to serve 6/7 of his 2018 four (4) year determinate sentence which equals three (3) years, five (5) months and two (2) days. When the 6/7ths of the 2018 term is added to the net time held in abeyance, the result is four (4) years and five (5) days as of the date petitioner was received by DOCCS – June 14, 2018, By crediting Petitioner with one (1) grace day and three hundred seventy-three (373) days (one (1) year and eight (8) days) of jail time, Petitioner's current Parole Eligibility date becomes June 10, 2021. With six (6) months and twenty-eight (28) days possible merit time, his Current Merit Eligibility date becomes November 12, 2020. Going through the same calculations without the reduction by 1/7th of the time held in abeyance on the November 2015 term and without the 1/7th time reduction on the 2018 term, the Petitioner would owe ten (10) months and seventeen (17) days of time held in abeyance on the November 2015 term and four (4) years consecutive to that on the 2018 sentence. When credited with one (1) grace day and three hundred seventy-three (373) days of jail time, Petitioner's current Maximum Expiration Date becomes April 22, 2022. If Petitioner is credited with possible good time of ten (10) months and twelve (12) days, his earliest Conditional Release date would be June 10, 2021.

While it is easy to understand Petitioner's disappointment in the corrections made by DOCCS, DOCCS is bound by law to do so.

The Department of Correctional Services "has a continuing, nondiscretionary, ministerial duty to make accurate calculations of terms of imprisonment, a duty that requires it to correct known errors" (*Matter of Patterson v Goord*, 299 A.D.2d 769, 770 [2002] [internal quotation marks and citations omitted]; see *People ex rel. Jackson v Morrissey*, 43 A.D.3d 1301, 1302 [2007], *lv. denied* 9 N.Y.3d 816 [2007]; *Matter of Maguire v New York State Div. of Parole*, 304 A.D.2d 1003, 1004 [2003]).

Colon v. Fischer, 74 A.D.3d 1670 (2010).

The computation error in Petitioner's time calculations resulted from the treatment of his June 2015 sentence, and November 2015 sentence, as running concurrently and resulting in both sentences being credited with four hundred eleven (411) days of jail time. However, Petitioner was not indicted on the charges resulting in the November 2015 sentence until July 7, 2015, and was not arraigned on them until October 23, 2015, therefore it was not possible for him to have been detained in the county jail on the charges resulting in the November 2015 sentence and he should not have been credited with the jail

time certified to the June 2015 sentence. In order to receive the credit to November 2015 sentence, Petitioner would have had to have been “held in custody on more than one charge prior to the commencement of any sentence.” *Matter of Collins v. Vincent*, 42 NY2d 191, 201 (1977); citing, *People ex rel. Middleton v. Zelker*, 36 NY2d 691 (1975). However, here Petitioner commenced serving his June 2015 sentence and was received into DOCCS custody on June 18, 2015 – before he was even indicted on the charges resulting in the November 2015 sentence.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Date: October 21, 2020
at Schenectady, New York


Michael R. Cuevas
Supreme Court Justice